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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT LOMBARD,

Defendant and Appellant.

B267525

(Los Angeles County
Super. Ct. No. BA431568)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Leslie A. Swain, Judge. Reversed and remanded.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant
Attorney General, Paul M. Roadarmel, Jr. and Amanda V. Lopez, Deputy Attorneys
General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Vincent Lombard of one felony count of making criminal threats. In a bifurcated proceeding, Lombard admitted he suffered a prior felony conviction in 2008, also for making criminal threats. In sentencing Lombard, the court imposed a five-year prior strike enhancement under Penal Code¹ section 667, subdivision (a)(1), as well as a one-year prison prior enhancement under section 667.5, subdivision (b), both based on Lombard's 2008 criminal threats conviction. On appeal, Lombard contends he did not knowingly and intelligently waive his right to a jury trial on the one-year prison prior enhancement allegation and, in any event, the People failed to prove the elements necessary to impose that enhancement. We reverse the imposition of the one-year prison prior enhancement and remand for further proceedings, including a potential new trial on the prison prior allegation.

FACTUAL AND PROCEDURAL BACKGROUND

On September 10, 2014, Lombard's girlfriend reported to the police that Lombard had threatened her. During an argument about his alleged infidelity, Lombard grabbed a large knife, held it up, and said to his girlfriend, "I'll cut you like a stuffed pig and watch you bleed out." Scared for her life, Lombard's girlfriend left the apartment and called the police.

The People charged Lombard with making criminal threats (§ 422, subd. (a)), a felony, and alleged he used a deadly or dangerous weapon during the commission of the crime (§ 12022, subd. (b)(1)). The People also alleged Lombard suffered a prior criminal threats conviction in 2008, a violent or serious felony for purposes of the three-strikes law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)). In addition, the People alleged Lombard served a prison term for his 2008 conviction and failed to remain crime-free for a five-year period following his release from custody (§ 667.5, subd. (b)).

¹ All undesignated statutory references are to the Penal Code.

While the jury was deliberating in Lombard's trial, the court and Lombard's counsel discussed whether Lombard would admit his prior criminal threats conviction. The following discussion occurred.

The Court: Would you please discuss with [Lombard] the priors[?]

Counsel: Uh-huh.

The Court: Can you do it now so we can get it out of the way?

Counsel: Okay . . . [¶] I will do it now, just not—just not on the record.

The Court: Right. I thought you could quietly talk to him or do you need more time?

Counsel: No.

After Lombard and his counsel spoke off the record, the following conversation took place.

Counsel: My client will admit the prior if it comes down to that.

The Court: Oh, okay. I was just interested in getting a jury waiver. [¶] So, at this point, Mr. Lombard, do you agree that if there is a guilty verdict on count 1, that you will not require the jury to determine whether you suffered your prior conviction?

Lombard: Yes.

The Court: Okay. Thank you very much.(RT 227)~

The jury then returned with its verdict. The jury convicted Lombard of making criminal threats, and it found true the allegation that he personally used a deadly or dangerous weapon during the commission of the crime.

The court held Lombard's sentencing hearing two months after the jury delivered its verdict. The court first heard Lombard's *Romero*² motion requesting dismissal of his 2008 criminal threats conviction. In opposing the motion, the prosecutor informed the court Lombard had served a prison term for his criminal threats conviction between

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

May and November 2011. Although Lombard's counsel acknowledged Lombard had been paroled on his sentence in that case, Lombard did not admit he served a prison term for that conviction. The court denied Lombard's *Romero* motion.

After denying Lombard's motion, the court conducted a hearing on the prior conviction allegations. The following discussion occurred as the prosecutor obtained Lombard's waiver of rights and admission that he suffered his prior criminal threats conviction.

The Prosecutor: Is Vincent Lombard, your true and correct name?

Lombard: Yes.

The Prosecutor: And sir, is your true and correct date of birth December 26th, 1965?

Lombard: Yes.

The Prosecutor: Sir, you already previously waived your right to a jury trial on the priors and indicated that you wanted a court trial. [¶] At a court trial you would have the right to confront and cross-examine the witnesses against you that the People would be required to call in order to prove that you, in fact, beyond a reasonable doubt suffered the prior conviction that's alleged in the information in case BA431568. What that means is that you would have the right through your attorney to confront and cross-examine all of the witnesses that the People call. [¶] If you wanted to call your own witnesses, you have the right to do that using the subpoena powers of the court at no cost to you. If you wanted to testify at that priors trial, you would have the right to do that, as well; however, no one could force you to testify, as you still have the right to remain silent at a priors trial. And those would be the constitutional rights that you would have. They're obviously, the same rights that you would have if you had a jury trial. [¶] Do you understand all the rights you would have at a priors trial?

Lombard: Yes.

The Prosecutor: And do you agree to give up all of those rights?

Lombard: Yes.

The Prosecutor: And sir, do you admit that on or about October 14th, 2008, you suffered a prior conviction for violation of Penal Code section 422 in case BA343344 in the Superior Court of Los Angeles County?

Lombard: Yes.

The Prosecutor: Does counsel join in the waivers and the admission?

Counsel: Yes.

The Prosecutor: People join.

The Court: All right. So, the defendant has admitted the prior.

The sentencing in this matter will be imposed pursuant to the three strikes law.

The court sentenced Lombard to an aggregate term of eight years and eight months in state prison. The court calculated Lombard's sentence as follows. It selected the low term of 16 months in state prison for Lombard's current criminal threats conviction and doubled it to 32 months under the three-strikes law (§§ 667, subd. (d) & 1170.12, subd. (b)). The court then imposed a five-year term for the prior strike enhancement under section 667, subdivision (a)(1), arising out of Lombard's 2008 criminal threats conviction, as well as a one-year term for the weapon enhancement under section 12022, subdivision (b)(1). Finally, the court imposed, but stayed, a one-year term for the prison prior enhancement under section 667.5, subdivision (b), also arising out of Lombard's 2008 criminal threats conviction. Lombard filed a timely appeal.

DISCUSSION

Lombard contends he was not advised of his right to a jury trial, his right against self-incrimination, and his right to confront adverse witnesses with respect to the one-year prison prior enhancement allegation under section 667.5, subdivision (b). Lombard also contends he was not advised of, nor did he admit, the elements necessary to impose the enhancement. Specifically, he asserts he admitted only that he suffered a prior conviction, and not that he also served a prison term for that conviction and failed to remain free of a felony conviction for the five-year "washout" period, elements

the People must prove before the court may impose a prison prior enhancement under section 667.5, subdivision (b).³

Before a defendant may forgo a trial on, and admit the truth of, a prior conviction allegation, he must voluntarily and intelligently waive his right to a jury trial, his right against self-incrimination, and his right to confront adverse witnesses. (*People v. Mosby* (2004) 33 Cal.4th 353, 360 (*Mosby*); see also *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) While trial courts should obtain express waivers of these rights before a defendant admits the truth of such an allegation, a failure to do so does not necessarily require the reversal of a sentence enhancement imposed after the defendant admits the allegation. (*Mosby, supra*, 33 Cal.4th at pp. 360-361.) Rather, a defendant will be deemed to have waived these rights if, under the totality of the circumstances, the record demonstrates the defendant's waiver was nevertheless voluntary and intelligent. (*Ibid.*) The focus is not on whether "the defendant received express rights advisements, and expressly waived them," but whether "the defendant's admission was intelligent and voluntary because it was given with an understanding of the rights waived." (*Id.* at p. 361.) A reviewing court may look to the record of the entire proceeding, as well as the defendant's prior experiences with the criminal justice system, for evidence that the defendant's waiver was voluntary and intelligent. (*Id.* at pp. 361, 365.)

A similar "totality of the circumstances" test applies to evaluate the sufficiency of a defendant's admission of the facts necessary to establish a sentencing enhancement based on a prior conviction. (*People v. Carrasco* (2012) 209 Cal.App.4th 715, 725 (*Carrasco*), disapproved on other grounds as noted in *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518; see also *Mosby, supra*, 33 Cal.4th at pp. 356, 365.) While it is not required that the defendant expressly admit all of the necessary facts, the record must demonstrate that, under the totality of the circumstances, the defendant was aware

³ The parties' original briefs did not address these issues. After an initial review of the record, we requested the parties submit supplemental briefs addressing (1) whether the trial court obtained an adequate waiver of Lombard's constitutional rights; and (2) if so, whether Lombard admitted the elements necessary to establish the prison prior enhancement imposed under section 667.5, subdivision (b).

of the elements necessary to establish the enhancement and his admission covered all of the facts necessary to prove those elements. (*Carrasco, supra*, 209 Cal.App.4th at pp. 724-725.)

In *Carrasco*, for example, the defendant admitted he suffered prior convictions, but not the additional facts that he served separate prison terms for those convictions and that he committed a new crime within section 667.5, subdivision (b)'s five-year "washout" period. (*Carrasco, supra*, 209 Cal.App.4th at p. 723.) The court of appeal in *Carrasco* nevertheless concluded the defendant's admissions were sufficient to establish the elements of the prison prior enhancement because the information alleged the defendant had served separate prison terms for his prior convictions and had committed a new crime within the five-year "washout" period, and the trial court expressly referred to both the allegations in the information and section 667.5, subdivision (b), before obtaining defendant's admissions. (*Id.* at p. 725.) Specifically, before the defendant made the admissions, the trial court noted the priors were " 'both state prison priors pursuant to 667.5, subdivision (b).' " (*Ibid.*) The trial court also advised the defendant he could be sentenced to additional one-year prison terms for each of his prison priors and confirmed the defendant understood the consequences of admitting his prior convictions. (*Ibid.*) The trial court then found the prior convictions true " 'within the meaning of Penal Code section 667.5, subdivision (b).' " (*Ibid.*) The court of appeal in *Carrasco* concluded that, under the totality of the circumstances, the defendant admitted the allegations set forth in the information, including all of the elements under section 667.5, subdivision (b). (*Ibid.*)

Here, we cannot conclude that, under the totality of the circumstances, Lombard understood he was admitting not only the fact of his prior conviction, but also the facts necessary to establish the prison prior enhancement allegation under section 667.5, subdivision (b). At no point before Lombard admitted he suffered a prior criminal threats conviction did the court, the prosecutor, or Lombard's counsel refer to section 667.5, subdivision (b), the elements for proving the prison prior allegation, or the prison prior allegation in the information. Nor did anyone advise Lombard of the

penal consequences of admitting the prison prior allegation—specifically, that he could be sentenced to an additional one-year prison term if the allegation were proven true. Rather, the court and the prosecutor referred only to Lombard’s “prior conviction.” For example, before Lombard first indicated he would waive his right to a jury trial on the issue of proving his prior conviction, the court asked him whether he agreed “that if there is a guilty verdict . . . , [he would] not require the jury to determine whether [he] suffered [his] prior conviction.” The court did not refer to section 667.5, subdivision (b), nor did it refer to any prison term Lombard may have served. When the prosecutor advised Lombard of his rights before obtaining his waiver, she too referred only to Lombard’s “prior conviction.” Indeed, the prosecutor asked only if Lombard admitted he “suffered a prior conviction for violation of Penal Code section 422,” while never referring to section 667.5, subdivision (b), its elements, or the allegation in the information concerning the prison prior enhancement. Although the prosecutor did refer to a prison term Lombard served for his 2008 conviction while opposing Lombard’s *Romero* motion, that argument was made before the hearing on the sentence enhancement allegations, and Lombard himself never acknowledged that he had served such a prison term. (See § 1170.1, subd. (e) [“All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.”]; § 1018 [“[E]very plea shall be entered or withdrawn by the defendant himself or herself in open court.”]; *People v. Golde* (2008) 163 Cal.App.4th 101, 113 [defendant not bound by counsel’s admission that defendant is subject to a sentence enhancement].)

In short, we conclude Lombard did not knowingly and intelligently admit the prior prison allegation necessary for imposition of the one-year enhancement under section 667.5, subdivision (b). Accordingly, the imposition of that enhancement is reversed, and the matter is remanded for further proceedings, including a possible retrial

concerning the enhancement allegation.⁴ (See *People v. Barragan* (2004) 32 Cal.4th 236, 241, 243-258.)

DISPOSITION

The judgment is reversed and remanded as to the one-year prison prior enhancement imposed under section 667.5, subdivision (b).

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.

⁴ Because we reverse the imposition of the one-year prison prior enhancement, we do not need to determine if the trial court also erred in staying, rather than striking, that enhancement.